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JUN 25 1992

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Federal Communications Commission
Office of the Secretary
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June 25, 1992

VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

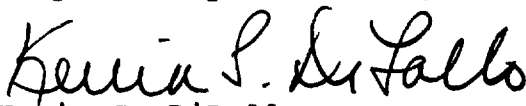
Re: CC Docket No. 92-90, In the Matter of The Telephone
Consumer Protection Act of 1991

Dear Ms. Searcy:

Enclosed herewith for filing in the referenced proceeding are the original and five (5) copies of the Reply Comments of American Express Company. Also enclosed herewith is a completed Record Image Processing System form to accompany the filing.

Please direct any questions regarding the enclosed Comments to the undersigned.

Respectfully submitted,


Kevin S. DiLallo

Enclosures

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JUN 25 1992

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
)
The Telephone Consumer)
Protection Act of 1991)

CC Docket No. 92-90

REPLY COMMENTS OF AMERICAN EXPRESS COMPANY

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Dated: June 25, 1992

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SUMMARY

American Express Company believes that the Commission should implement the Telephone Consumer Protection Act ("TCPA") in a manner which most efficiently serves consumer interests at the most reasonable cost to businesses that rely in part on telemarketing. If warranted by available data, implementation of a self-administered, company-specific "do-not-call" list would strike this balance.

Costs associated with the establishment and use of a national database are substantial and are not justified by the limited benefits of such a database. This is particularly true in light of other non-cost-related disadvantages of the national database approach.

Although available reliable data does not appear to establish a need to restrict live telephone contacts, to the extent the Commission concludes otherwise, a self-administered, company-specific approach, while not perfect, would appear to be the most efficient and least problematic (for both consumers and business) of the five alternatives proposed by the Commission.

If the Commission adopts this approach, it should exercise its discretion to fashion guidelines for compliance which will allow businesses subject to the guidelines the flexibility to implement the do-not-call procedure in a manner which best suits the unique needs of their customers.

JUN 25 1992

Federal Communications Commission
Office of the Secretary

**REPLY COMMENTS OF
AMERICAN EXPRESS COMPANY**

The purpose of these Reply Comments is threefold: (1) to provide the Commission with quantitative data concerning the costs of a national database designed to prevent telephone solicitations to objecting residential subscribers; (2) to compare the self-administered, company-specific "do-not-call" approach for preventing such telephone solicitations (hereinafter referred to as the "company-specific approach") to other less flexible alternatives under consideration; and (3) to propose a regulatory framework for implementation of the company-specific approach, to the extent that a need for any regulation is demonstrated in this proceeding.

American Express continues to believe, as it stated in its Initial Comments, that available data fails to provide a

reasonable basis for concluding that a need exists to curb live telephone solicitations to residential subscribers (as opposed to telephone solicitations delivered by a prerecorded or simulated voice machine). To the extent that the Commission concludes otherwise, the Telephone Consumer Protection Act, Pub. L. No. 102-243 ("TCPA"), requires the Commission to "develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient" to prevent objectionable calls to residential subscribers.^{1/}

Of the five proposed methods for preventing objectionable telephone solicitations discussed in the NPRM, the least "effective and efficient" method, for reasons already stated by American Express and numerous other commenters in their Initial Comments, is the national database.

**I. THE COSTS OF A NATIONAL DATABASE TO PREVENT
OBJECTIONABLE TELEPHONE SOLICITATIONS ARE SUBSTANTIAL
AND ARE NOT JUSTIFIED BY THE LIMITED BENEFITS OF SUCH A
SYSTEM.**

A number of commenters have noted the significant costs of creating, maintaining, and using a national database to prevent objectionable telephone solicitations to residential subscribers, but the record contains little specific quantitative data as to the precise nature of those costs.

^{1/} TCPA itself does not recognize a need to curb such solicitations, but instead requires the Commission to "consider whether there is a need for additional Commission authority to further restrict telephone solicitations" TCPA, § 3(c)(1)(D), codified at 47 U.S.C. § 227(c)(1)(D) (emphasis added).

One of American Express's subsidiary companies, IDS Financial Corporation ("IDS"), has calculated the various costs to its businesses of implementing a national database. These estimated costs do not include the cost of establishing the database and collecting the data which it would contain.

Attached hereto as Exhibit A is a comparative summary of the estimated costs to IDS of a national database and a company-specific approach.^{2/} The calculations could be representative of numerous other financial services and other firms that sell products or services through a large network of representatives making contacts by telephone. Such companies employ thousands of representatives in scores of individual offices in virtually every state.

The cost of utilizing a national database could be expected to vary depending on the number of residential telephone subscribers electing to be included in the database, the number of company representatives that would be affected, and the sources of business for each representative (e.g., the number of customers located through referrals versus cold calls). IDS has assumed quarterly updating of the national database, and a realistic database rental fee to businesses of \$5.00 per one thousand names in the database,^{3/}

^{2/} Numerical assumptions used to calculate the comparative costs of the database and company-specific approach are explained in greater detail in Exhibit A.

^{3/} This estimate would seem to be reasonable, based on IDS's experience in renting similar suppression lists from a major list compiler.

If only 10% of telephone subscribers participate in the database, the aggregate annual cost of maintaining and using a national database for every company that is similar to IDS -- and there are many of them -- could be expected to exceed \$2 million. This figure could be expected to rise to over \$3 million annually if 25% of telephone subscribers participate in the database, and it would soar to over \$5.5 million if 50% of telephone subscribers participate.

In addition to these substantial costs, the public or private entity that ultimately compiles the database and makes it available to telemarketing companies would incur significant costs in gathering data, updating information, designing software, distributing data in electronic or paper form, and in undertaking the administrative tasks that would be associated with creating, maintaining, promoting, and distributing a national database. Presumably, these costs would be passed on to companies required to use the database, which could increase the IDS estimates.

Not only would these substantial costs have a severe adverse effect on the profitability of legitimate, large, centralized corporations that already have automated equipment capable of utilizing a computer database, but smaller, decentralized companies that are not already computerized could be devastated by the required additional investment or, as an alternative to computerizing, their operations could be crippled by the mountains of paper they would be required to handle. Regardless

of the circumstances of individual businesses, the economic consequences to affected businesses would be dire. Large corporations could be expected to weather the storm better than their smaller competitors, many of which might simply succumb under the expense of compliance.

Particularly in light of the other non-cost-related disadvantages of a national database (e.g., the fact that such an approach would deny consumers the flexibility to distinguish between sources of information in which they are interested and those in which they are not), the immense costs of a national database vastly outweigh the minimal benefits such an approach could provide to consumers. Such an approach does not serve the public interest and does not fulfill the Congressional mandate to find, if warranted, an "effective and efficient" means of preventing objectionable telephone solicitations.

II. DESPITE ITS FLAWS, THE COMPANY-SPECIFIC "DO-NOT-CALL" APPROACH OFFERS THE GREATEST FLEXIBILITY TO CONSUMERS AT THE LEAST COST TO BUSINESS.

In its initial comments, American Express stated that it was analyzing the efficacy of self-administered, company-specific do-not-call lists as a means of responding effectively to consumer privacy concerns. After reviewing the initial comments of numerous parties in this proceeding, American Express has determined that, while each of the proposed methods of preventing objectionable telephone solicitations has inherent problems, the method that would seem to offer the greatest flexibility to

consumers at the least cost to business is the company-specific do-not-call list.

It would be naive, however, to assert that the company-specific approach would not entail significant costs to businesses required to implement such an approach. As more specifically illustrated on Exhibit A hereto, IDS has calculated that the annual cost to a large decentralized company of a comprehensive and effective mechanism of this sort would approximate \$900,000.^{4/} While this number is significant, it is dwarfed by the costs IDS has estimated for a national database.

Perhaps the most important aspect of the company-specific option which places it ahead of the other proposed alternatives is that it responds more than other options to consumer needs, giving consumers the greatest amount of flexibility and preserving consumer choice. In contrast, any other kind of sweeping approach (such as a national database) would harm consumer interests and preclude full exercise of consumer choice. As AT&T noted in its initial Comments, with the company-specific approach, "[c]onsumers would be able to designate which companies they wish to hear from and which they do not. No other alternative offers this flexibility." AT&T Comments at 8.

Moreover, a company-specific do-not-call list is a far more manageable approach than most other methods for businesses to implement and maintain, and therefore it would more effectively

^{4/} This estimate of course depends on a number of variables, which are briefly explained on Exhibit A.

serve the mutual interests of consumers and business. Such an approach would allow businesses to implement procedures which take into account their own peculiar characteristics and the unique interests of their customers.

Despite its costs and the fact that reliable data available to date does not appear to warrant the establishment of any system to limit live residential telephone solicitations,^{5/} of the five alternatives discussed in the NPRM, the company-specific do-not-call list would seem to be the most effective and efficient method and therefore would be most consistent with the objectives and letter of the law.

III. THE COMMISSION SHOULD CRAFT GUIDELINES FOR COMPLIANCE WITH ITS REQUIREMENTS THAT WOULD ALLOW TELEMARKETING BUSINESSES TO IMPLEMENT PROCEDURES SUITED TO THE UNIQUE CHARACTERISTICS OF THEIR BUSINESS.

Regardless of the method, if any, adopted by the Commission for limiting live telephone solicitations to objecting residential subscribers, the viability of the method selected will depend on the ability of businesses to implement appropriate procedures quickly, effectively, and economically. Just as one of the primary advantages of the company-specific approach is the flexibility it provides to consumers, such flexibility could be vitiated if the manner in which businesses are required to

^{5/} See, e.g., NPRM at ¶ 24 (of the 757 complaints received by the FCC in 1991 regarding unsolicited telemarketing, only 74 -- fewer than 10% -- resulted from live telephone solicitations).

implement the system is inflexible or unsuitable to a wide variety of businesses and consumers.

Accordingly, if any method is to be effective, businesses required to implement it must be allowed to adapt the method to their unique circumstances. For example, affected companies should be permitted to specify their own reasonable methods by which their customers -- whose peculiar needs each company knows best -- could specify that they wish not to receive telephone solicitations from that company.

In drafting guidelines for complying with any required procedures, the Commission should carve out exceptions to these requirements that are consistent with the exemptions proposed by Congress in Section 3(a) of TCPA. Congress anticipated that these exempted categories of calls would not fall within the statutory definition of "telephone solicitation," and therefore would not be subject to any procedures selected by the Commission.^{6/} Specifically, the Commission should exempt from any adopted requirements at least the following types of calls:

1. calls made to any person with that person's permission or consent;^{7/}

^{6/} See TCPA, §§ 3(a), 3(c)(1)(D) (tentatively exempting certain categories of calls, but permitting the Commission to determine whether even such exempted calls should be regulated).

^{7/} In recognition of the manner in which the marketplace functions, this exemption should include calls to individuals whose names have been referred to the calling party by another consumer. Businesses should be permitted to assume that a person making a referral has the permission of the person he or she is referring to the business. In other words, a presumption of consent should apply in the case of referrals, because referrals
(continued...)

2. calls made to any person with whom the caller has an established business relationship;^{8/} and
3. calls made by a tax exempt nonprofit organization.

Businesses that may be subject to whatever regulations are adopted will need at least eighteen months to comply with the regulations and to design, install, test, and implement the system selected by the Commission. Such tasks may include hiring and training of personnel; informing existing customers about the availability of the do-not-call list; designing software; gathering data; and disseminating data to satellite business locations, to name only a few of the required tasks. Assuming that a business has the fiscal, human, and other resources to implement a system at all, eighteen months should provide a sufficient opportunity to design and implement the required procedures.

A lag time almost necessarily will exist between the time a consumer requests inclusion on a company-specific do-not-call list and the time when the consumer's request is fully

^{7/}(...continued)

involve the introduction of two previously unacquainted parties by a party mutually acquainted with both. No opportunity to give prior consent would have existed as between the previously unacquainted parties, although it would have existed as between the previously acquainted parties.

^{8/} See American Express's Initial Comments at pages 16-18 for a more complete exposition of the suggested parameters of this exemption, including that (1) the term "business relationship" should encompass any voluntary two-way communication between parties, regardless of transfer of money, goods, or services; (2) exempted business relationships should include prior, as well as existing, and ongoing, as well as sporadic, relationships; and (3) the exemption should extend to agents of the parties acting on behalf of their principals who have a business relationship.

effectuated. Any guidelines which the Commission might draft for complying with its regulations should allow for such a lag time, which American Express estimates could range from 30 to 60 days in duration. Furthermore, consumers should be informed in advance of the existence of the lag time to avoid false expectations, confusion, and misunderstanding.

The guidelines adopted by the Commission also should take into account the fact that consumers' circumstances are not set in stone, but in fact change with time. One manner of recognizing such change would be to allow firms to tailor their company-specific procedures to permit customers to choose not to receive telephone calls either for an indefinite, or for a specified, time period.

Given the number of variable factors involved in any system selected by the Commission -- e.g., consumers' changing telephone numbers, moving, or changing their names, and the time needed to add customers to the list and to effectuate changes in information -- it is inevitable that mistakes will be made, and that consumers who have requested inclusion on a company's do-not-call list may be called. Perhaps in recognition of this fact, TCPA provides for an affirmative defense to any private action for violation of Commission restrictions in this regard if the defendant telemarketer can demonstrate that it has established "reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed," TCPA, § 3(c)(5). As a point of clarification,

American Express asserts that defendants that can demonstrate good faith efforts to comply with the required procedures should be entitled to a rebuttable presumption of compliance with TCPA. Anything less than a rebuttable presumption could expose telemarketing firms to a flurry of frivolous litigation resulting in great cost to the firms, with no additional benefit to consumers or privacy interests in general.

Finally, any guidelines adopted by the Commission should clarify that customers requesting to be placed on the do-not-call list for one company will not automatically be placed on the do-not-call lists for such company's parent, affiliates, or subsidiaries. This is a critical matter for diversified companies that have a number of different subsidiaries or affiliated businesses. As Citicorp has noted, "[p]lacement on the lists of other, affiliated enterprises should remain the choice of the customer." Citicorp Comments at 27.

CONCLUSION

American Express supports the Commission's efforts to prescribe balanced regulations which carry out the mandate of TCPA in a manner which most effectively serves consumer needs,

and least infringes on the ability of businesses to conduct
legitimate marketing practices.

Respectfully submitted,

AMERICAN EXPRESS COMPANY

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Its Attorneys

Dated: June 25, 1992

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EXHIBIT A

ANNUAL COST SUMMARY^{1/}

I. COMPANY-SPECIFIC DO-NOT-CALL LIST:

List Maintenance Costs - \$43,000.00

Costs include an 800 number with an answering machine back-up, employee costs, programming and data processing expenses, and printing costs for monthly lists for 7,000 representatives.

Representatives Compliance Costs - \$865,500.00

The largest component of these costs is the value of 7,000 representatives' time to utilize the lists of prospective customers electing not to receive telephone solicitations. It is assumed that paper directories would be used, because many companies, including IDS, are not equipped to handle electronic databases of this nature. The calculation of this estimate recognizes the differences between the less efficient sources of business for new representatives and the more efficient sources of business for veteran representatives. Assumptions include 2,500 new representatives and 4,500 veterans with an average assumed hourly rate.

**TOTAL ANNUAL COST OF
COMPANY-SPECIFIC DO-NOT-CALL LIST: \$900,000.00^{2/}**

II. NATIONAL DATABASE:

List Utilization Costs

Costs are driven primarily by the number of consumers electing inclusion in the national database. Calculations were based on a total universe of 67,567,000 consumer households with listed telephone numbers, with varying percentages (10%, 25%, 33%, and 50%) electing inclusion in the national database. The calculations assume a quarterly list rental fee of \$5.00 per thousand names on the national database, as well as estimates for employee costs, programming and

^{1/} Certain cost assumptions used in IDS's calculations have not been disclosed herein because of their proprietary nature.

^{2/} Figure is rounded to the nearest \$100,000.

data processing expenses, and printing costs for quarterly lists for 7,000 representatives.

Cost based on percentage electing inclusion:^{3/}

10%	-	\$	300,000
25%	-	\$	700,000
33%	-	\$	900,000
50%	-	\$	1,400,000

Representatives Compliance Costs

Costs are driven primarily by the number of consumers electing inclusion in the national database and by the value of 7,000 representatives' time required to utilize quarterly lists of prospective customers electing inclusion in the national database. It is assumed that paper directories would be used, because many companies, including IDS, are not equipped to handle electronic databases of this nature. These calculations utilize the same assumptions regarding sources of business, number of representatives, and assumed hourly rate as were used in calculating estimates for the company-specific approach.

Cost based on percentage electing inclusion:^{4/}

10%	-	\$	1,900,000
25%	-	\$	2,600,000
33%	-	\$	3,100,000
50%	-	\$	4,200,000

TOTAL ANNUAL COST OF NATIONAL DATABASE:^{5/}

10%	-	\$	2,200,000
25%	-	\$	3,300,000
33%	-	\$	4,000,000
50%	-	\$	5,500,000

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^{3/} Figures are rounded to the nearest \$100,000.

^{4/} Figures are rounded to the nearest \$100,000.

^{5/} Figures are rounded to the nearest \$100,000.